bunal's determination of fact is entirely a creature of statute.[7] It would clearly seem, however, that the rule as here laid down is based on the grounds that there has already been a determination of fact by a jury in the lower court. Moreover in regard to the point in question the jurisdiction of the court and the right of appeal is created by statute. The second argument is that the accused goes to trial before a petit jury without ever having his case tried before the grand jury. The right of State legislatures to pass laws of this nature has been distinguished from the right of Congress to pass similar statutes.[8] Since the Federal Government is a government of enumerated powers. Congress can do nothing except what the Constitution either directly or by reasonable construction authorizes it to do. State legislatures, on the other hand, possess all legislative powers not prohibited by the constitution. Thus the presence of a jury in United States courts becomes a jurisdictional question and as Mr. Justice Harlan said in *Callan* v. *Wilson*,[9] "a verdict of conviction not based upon a verdict by a jury is void."

Even in jurisdictions which hold as a general proposition that a statute is valid which, while it deprives a person of jury trial in the first instance, provides for jury trial on appeal, it is held that if the statute imposes unreasonable conditions on the right to a trial by a jury on appeal it is unconstitutional.[10] In the recent case of *Vetock* v. *Hufford* (W. Va.), 82 S. E. 1099, the general rule is laid down as to what is an unreasonable restriction. Here the jurisdiction of a justice of the peace over the misdemeanor of carrying a concealed weapon was upheld but the requirement of a recognizance bond as a condition for appeal to jury trial was held an improper restriction on the right. Where the option of commitment or recognizance is given the defendant his right of appeal to a jury trial is not unreasonably restricted.[11]

OWNERSHIP OF LAND UNDERLYING NAVIGABLE WATERS.—The common law and present English doctrine of the ownership of the bed of navigable streams was early laid down in a case in which the court said that every river is a royal river as far as the tide in it ebbs and flows, because so far it partakes of the nature of the sea, and is an arm of the sea, and the sea is the king's.[1] But inland

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[7] U S. *v.* Wonson, 1 Gall. 5, Fed. Cas. No. 1675.
[8] Brown *v.* Epps, *supra*. [9] 127 U. S. 540.
[10] Sullivan *v.* Adams, 69 Mass. 476. In Sacco *v.* Wentworth, 37 Me. 165, 58 Am. Dec. 786, a heavy recognizance bond made the sole condition for the right of appeal was held void, though the right of appeal is preserved. State *v.* Gurney, 37 Me. 156, 58 Am. Dec. 782.
[11] State *v.* Everett, 14 Minn. 330.
[1] Case of the Royal Fishery of the Banne, Davis 55; Bulstrode *v.* Hall, 1 Sid. 148. A grant by the King, however, in derogation of the public right is invalid. Williams *v.* Wilcox, 8 Adol. & El. 314.

non-tidal lakes and rivers were not considered public property, and the crown had no *de jure* right to their soil or fisheries.[2]

In England, therefore, it will be seen that the test of navigability was the ebb and flow of the tide, and not the actual fact of practical adaptability of the water in question to navigation. Any river or other body of water in which the tide ebbed and flowed was considered navigable and therefore public. And every non-tidal body of water was considered private, no matter how suitable for navigation it might actually be; and the owners of the water front owned the bed to the middle of the stream or lake. This test was very well suited to the waters of England, as there were few non-tidal rivers and fewer such lakes that were actually navigable. The tidal test covered practically all really navigable waters, and, as stated later in a New Jersey case,[3] it possessed the merits of convenience and certainty. Such was the state of the law when the American Colonies separated from England and established independent judicial systems of their own.

After the American Revolution, the people of each State became themselves sovereign, and in that character held the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the Federal Government.[4] The shores of such waters and the soils under them were not granted by the Constitution to the United States, but were reserved to the several States respectively; and the new States have the same rights, sovereignty, and jurisdiction over this subject as the original States. The United States never held any municipal sovereignty, jurisdiction, or right in and to the territory of which any of the new States were formed, except for temporary purposes.[5]

It follows, therefore, that the rights of riparian owners of land situated upon navigable rivers are to be measured by the rules and decisions of the courts of the State in which the land is situated, whether it be one of the original States or a State admitted after the adoption of the Constitution.[6]

Since each State thus determines for itself the rules governing navigable waters, it is not surprising to find great diversity of rule and reason in the decisions of their respective courts. Some have adopted the common law rule *in toto*, holding that fresh-water lakes and non-tidal rivers are private and not public waters, that therefore riparian owners hold title to the middle or thread of such waters, and that the fact of actual navigability does not enter into the decision of the ownership or title to the land beneath them.[7]

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[2] Bristow *v.* Cormican, L. R. 3 App. Cas. (1878) 641.
[3] Cobb *v.* Davenport, 32 N. J. L. 369.
[4] Martin *v.* Waddell, 41 U. S. (16 Pet.) 367.
[5] Pollard *v.* Hagan, 44 U. S. (3 How.) 212.
[6] St. Anthony Falls, etc., Co. *v.* St. Paul Water Commissioners, 168 U. S. 349.
[7] Berry *v.* Snyder, 66 Ky. (3 Bush.) 266; Johnson *v.* Johnson, 14 Idaho 561, 95 Pac. 499, 24 L. R. A. (N. S.) 1240; see Cobb *v.* Davenport, *supra*.

The logical sequence of the rule is that in these jurisdictions the State holds title to the bed of all tidal streams, since such was the rule of the common law.[8] The rule is supported by the argument that such was the holding of the English courts at the conclusion of the Revolution, and that, whether right or wrong, it must remain the law of the States, since the common law, as it existed at that date, became the law of each State after the separation from England.

By far the larger number of the American States, however, have cast aside the common law rule as unsuited to their circumstances and needs. They still hold that navigable waters are public waters, with ownership of their bed in the State;[9] and non-navigable waters are private, with ownership of their bed resting in the riparian proprietors.[10] Yet they apply a different test of navigability in determining the public or private character of the stream or lake. They hold that a body of water navigable in fact is a public water, regardless of the ebb and flow of the tide.[11] For, they say, our system of long, inland, fresh-water rivers actually navigable for great distances above tidewater, has rendered the English test unsuited to our needs. Such a test, if applied here, would hinder commerce, and take from the State much that rightfully belongs to it. It would render navigable only a very small portion of our rivers and lakes that are in fact suited to commerce.

Not only is there difference of opinion as to the test of navigability, but when the test is applied and a river or lake is found to be navigable, there is conflict as to the character of the title the State has in the land underlying the water. Some States hold that the State has absolute title to the bed of the stream and can grant it to private individuals for practically any purpose, so long as the paramount public right of navigation is not hampered.[12]

But in the recent case of *State* v. *Korrer* (Minn.), 148 N. W. 617, it was held that title to the bed of navigable fresh-water lakes is in the State, not in the sense of ordinary absolute proprietorship, but in its sovereign governmental capacity, for common public use, and in trust for the people of the State, for the public purposes for which they are adapted. The same general rule is followed in other States as to navigable lakes and rivers, and the State can therefore grant only such rights in these waters as foster and do not hinder or destroy the proper exercise of the public rights therein.[13]

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[8] Woodcliff Land Imp. Co. *v.* N. J. Shore Line R. Co., 72 N. J. L. 137, 60 Atl. 44.

[9] Hohl *v.* Iowa Cent. Ry. Co. (Iowa), 143 N. W. 850; Pacific Milling, etc., Co. *v.* City of Portland, 65 Or. 349, 133 Pac. 72, 46 L. R. A. (N. S.) 363; State *v.* West Tenn. L. Co., 127 Tenn. 575, 158 S. W. 746.

[10] Watt *v.* Robbins (Iowa), 142 N. W. 387.

[11] Hohl *v.* Iowa Cent. Ry. Co., *supra;* Pacific Milling, etc., Co. *v.* City of Portland, *supra;* State *v.* West Tenn. Land Co., *supra.*

[12] Woodcliff Land Imp. Co. *v.* N. J. Shore Line R. Co., *supra.*

[13] Whitehead *v.* Cape Henry Syndicate, 105 Va. 463, 54 S. E. 306; Pacific Milling, etc., Co. *v.* City of Portland, *supra.*

There is yet one final point of conflict in the rules of the different States on this question, and that is as to the point at which the title of the riparian proprietor ends and that of the State begins. Some courts hold that the riparian proprietor holds title to high-water mark.[14] Others extend his ownership to low-water mark.[15] This is somewhat of an arbitrary distinction and generally of little value to the owner of the land, although in some cases important and valuable rights might turn upon it, as in the case of minerals between high and law-water mark.

THE DOCTRINE OF THE "ATTRACTIVE NUISANCE," OR "TURNTABLE CASES."—A question which has often arisen and which has been the cause of a great deal of discussion and a sharp conflict of authority is that of the duty of a landowner to prevent injuries to trespassing children which result from their interference with dangerous machinery or other artificial improvements on his land. Many courts lay down the rule that a landowner is liable to children, even though trespassers, for injuries resulting from dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, and easily guarded and rendered safe, provided he knows, or in the exercise of reasonable care, ought to have known, that they were dangerous and attractive to children. This has been called the doctrine of the "Attractive Nuisance," or, more generally, the doctrine of the "Turntable Cases," from the fact that the question has most frequently arisen in connection with injuries sustained by trespassing children while playing on a railroad turntable.

The doctrine seems to have been laid down first in the English case of *Lynch* v. *Nurdin*,[1] in 1841. It is a matter of grave doubt whether this case has been overruled or is still the law of England; in fact, the English law on the subject is so confused that it is difficult to say just what is the law on this subject. In 1909, however, in the first case involving a turntable accident which ever came before the English courts, the company was held liable on the ground of implied invitation.[2]

The first American case involving the doctrine came before the Supreme Court of the United States in 1873 and the court approved the doctrine.[3] Though the question has often arisen since that time,

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[14] Hohl *v.* Iowa Cent. Ry. Co., *supra;* Pacific Milling, etc., Co. *v.* City of Portland, *supra;* Woodcliff Land Imp. Co. *v.* N. J. Shore Line R. Co., *supra.*

[15] See Whitehead *v.* Cape Henry Syndicate, *supra.*

[1] 1 Q. B. 29. In this case the defendant left his horse and cart unattended in the street. The plaintiff, a boy of seven, was hurt while playing with the horse. The defendant was held liable for the injury.

[2] Cooke *v.* Midland Great Western Ry. Co. (1909), App. Cas. 229.

[3] Stout *v.* Sioux City and P. R. Co., 17 Wall. 657. In this case the plaintiff, a young boy, was injured while playing on the defendant's unguarded and unlocked turntable. The defendant was held liable on the ground that he impliedly invited the plaintiff.